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THE DOCTRINE OF BOSTON ICE COMPANY V. POTTER

The Supreme Court of Massachusetts decided the case of *Boston Ice Company v. Potter*¹ in 1877. It was an action for the value of ice furnished to the defendant by the plaintiff as the assignee of an express ice contract, if the contract was assignable; but, as the assignee sued in his own name and as at that time in Massachusetts the assignee of a contract had no right to sue on it in his own name,² no recovery on the express contract could be had in that action. The question involved in the case, therefore, was simply whether the defendant was under a quasi-contractual obligation to pay the plaintiff the reasonable value of the ice furnished.

The facts found by the court without a jury were "that the defendant in 1873 was supplied with ice by the plaintiff, but, on account of some dissatisfaction with the manner of supply, terminated his contract with it; that the defendant then made a contract with the Citizens' Ice Company to furnish him with ice; that sometime before April 1874 the Citizens' Ice Company sold its business to the plaintiff with the privilege of supplying ice to its customers;" that the plaintiff did not notify defendant of this change of business but supplied the defendant with the ice called for by the assigned contract from April 1, 1874, to April 1, 1875; that during all that time "the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company;" and that "the defendant received no notice from the plaintiff until after the ice had been delivered by it." Upon these facts the Court held that the plaintiff could not recover anything in the action brought, adding: "We are not called upon to determine what other remedy the plaintiff has."

While the case decides only a point in the law of quasi-contracts, there was in fact an express contract of which plaintiff was assignee;³ and because of that fact, and of the bearing it has

¹ 123 Mass. 28.

² See *Foss v. Lowell etc. Bank* (1873) 111 Mass. 285. *Borrowscale v. Bosworth* (1868) 99 Mass. 378.

³ "The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that Company covered the time of the delivery of the ice."—*Loc. cit.* p. 29.

on the quasi-contract question, it becomes highly important to consider a *dictum* of the Court which has been taken to mean that since the defendant was dissatisfied with the manner of supply of ice by plaintiff under the former arrangement, he might have refused to deal with the plaintiff as assignee of the Citizens' Ice Company's contract, if he had been notified in time of the assignment.¹ That *dictum* requires us to consider the assignability of the contract. A discussion of its assignability is especially desirable because in Massachusetts since 1897 "the assignee of a non-negotiable legal chose in action which has been assigned in writing may maintain an action thereon in his own name, but subject to all defences and rights of counter claim, recoupment or set-off to which the defendant would have been entitled had the action been brought in the name of the assignor."² As "non-negotiable legal chose in action" is broad enough to include an executory contract,³ a plaintiff in the situation of the Boston Ice Company, if the assignment was in writ-

¹ "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract, and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know."—Loc. cit. p. 30. The failure of the Court to distinguish here between the right of A to refuse to contract with B and the right, if any, of A to refuse to recognize B as the assignee of C's contract with A, will be noted later.

² 2 Rev. Laws Mass. (1902) p. 1439, § 35.

³ "If the words 'chose in action,' when first used with reference to an assignment or transfer thereof, necessarily imported a present right of action (a question which we have not examined), they have long since acquired a more extended meaning. * * * A note, bond or other promise not negotiable, is denominated a chose in action before the promissor or obligor is liable to an action on it, as well as after." *Haskell v. Blair* (1849) 3 Cush. (Mass.) 534, 535-536.

"Any right under a contract, either express or implied, which has not been reduced to *possession*, is a chose in *action*; and is so called because it can be enforced against an adverse party only by an action at law." 1 Parsons on Contracts, 9th ed. * 223.

See also *Torkington v. Magee* [1902] 2 K. B. 427, 430-431; *Delaware County v. Diebold Safe etc. Co.* (1889) 133 U. S. 473; *Deshler v. Dodge* (1853) 16 How. (U. S.) 622, 632; *Cook v. Bell* (1869) 18 Mich. 387; *Sterling v. Sims* (1883) 72 Ga. 51, 53. 2 Chitty on Contracts, 11th Am. ed. p. 1357. Leake on Contracts, 3d Eng. ed. p. 996.

ing, would naturally insist in Massachusetts to-day upon his rights as assignee.

I. *The Validity of the Assignment to the Boston Ice Co.*

Under the early common law a chose in action was inalienable.

"A creditor could not assign his debt. A reversioner could not convey his reversion, nor a remainder man his remainder. A bailor was unable to transfer his interest in a chattel. And, as we have seen, the disseisee of land or chattels could not invest another with his right to recover the *res*¹ or its value. In a word, no right of action, whether a right *in rem* or a right *in personam*, whether arising *ex contractu* or *ex delicto*, was assignable either by act of the party or by operation of law. * * * There were, however, a few exceptions to the rule."²

The reason for the non-assignability of choses in action is now admitted to have been the personal relation between the parties which the choses in action evidenced.³ As Parsons on Contracts says:

"We apprehend that the stronger and better reason was that no debtor shall have a new creditor substituted for the original one without his consent; for he may have substantial reasons for choosing whom he should owe."⁴

Under our modern law, business necessity has largely done away with the idea of the sacredness and inviolability of the personal relationship of the parties to choses in action. The transferability of choses in action, instead of being a rare exception to a general rule, has itself become the general rule to which we make necessary exceptions. The change from inalienability to alienability was of course gradual.

The first step was the recognition of delegable rights and duties. The owner of a chose in action was very early allowed to give another a power of attorney, to be exercised for the attorney's use, to collect rents and other moneys due the one giving the power; and this came to be known as an assignment.⁵ Where

¹ That, however, a disseisee of land who still had his right of entry could probably invest another by livery in law with his right to recover the *res*, see 19 Harvard Law Rev. 272-4.

² Professor Ames on "The Disseisin of Chattels," 3 Harvard Law Rev. 337-8.

³ Id. 338-9. Wald's Pollock on Contracts, 3d ed. 278.

⁴ 1 Parsons on Contracts, 9th ed. *223-4.

⁵ Professor Ames in 3 Harvard Law Rev. 340 n. 2. For Massachusetts cases see *Gerrish v. Sweetser* (1826) 4 Pick. 374; *Weed v. Jewett* (1841) 2 Metc. 608.

a man could act by servant or agent, he could authorize a third person to act in the authorizer's name for the third person's benefit and to sue in the authorizer's name, if an action at law became necessary, and that constituted an assignment. Though for a time the statutes against maintenance interfered with such authorizations, those statutes had to give way before business necessity; and even the express power of attorney finally ceased to be necessary where one could be implied in fact.¹ To-day an assignment is essentially a power of attorney, even in those states which permit the assignee to sue in his own name, and "it is important to bear in mind that the assignee under the statute still proceeds in a certain sense as the representative of the assignor."²

The second step was the recognition that the legal title to some choses in action could pass by an attempted assignment. That step was taken in the law merchant; the business world forced it upon the courts. It is only in the case of negotiable instruments, however, that the assignment of a chose in action passes the legal title. Indeed it is the passing of title which enables the transferee of a negotiable instrument to insist that his equity as purchaser for value without notice equals any equity of the maker and that therefore the transferee's legal title should prevail; and it is the failure of the legal title to pass that makes the assignee of a non-negotiable chose in action take "subject to equities." The business convenience which forced the law to recognize negotiability in addition to assignability is quite significant for our subject.

It being remembered that to-day choses in action are assignable unless there is some special reason why they should not be so, we must take up different kinds of choses in action to see if they have a message for us in regard to the contract in the Boston Ice Company case.

First with reference to bills and notes. Under them the title passes without the consent of the debtor. It never has been considered that the personality of the creditor mattered to the debtor once the obligation was created; it could matter only in the formation of the contract. The holder of a bill or note may transfer it to the debtor's most bitter enemy, and the latter may enforce it in court despite an admission by him that he bought the instrument and is suing on it for the express purpose of harassing

¹Professor Ames in 3 Harvard Law Rev. 341, n. 2.

²Id. 341.

the debtor. The debtor's "right to select and determine with whom he will contract" spoken of by the Massachusetts Court in the Boston Ice Company case, a right so sacred, according to that court, that he "cannot have another person thrust upon him without his consent" has no place in the law of bills and notes, *once the bill or note has become a binding obligation*; it is a right which attends the formation of the contract but has nothing to do with its transfer. Even the Massachusetts Court would not deny this fact as to bills and notes. The legal title to the bill or note is in the payee, and, the law not forbidding alienation but on the contrary encouraging it, the payee's right to alienate even to the debtor's enemy is of superior force to any right the debtor may have not to owe his enemy. The hardship on the payee of being unable to sell to the debtor's enemy seems so much greater to the law than the hardship on the debtor of having to owe his enemy that the law permits the transfer to the enemy. By permitting the transfer the law is carrying out the wishes and meeting the needs of business people.

What is true of bills and notes is true of simple contract debts, with the exception that the latter are assignable only and not negotiable. The assignee does not get title but does get the right to collect in his assignor's name, even if the statutes do not give him also the right to sue in his own name or require him to do so. The debtor has no right to object to an assignment of the debt to the debtor's enemy, because he would have no right to refuse to pay that enemy if the latter were simply the creditor's agent to collect or were the creditor's executor. The right of the creditor to sell the debt to whom he pleases is again superior to the debtor's right to be free from his enemy's interference. The assignee takes subject to "equities," but there is no such "equity" in the debtor's enmity to him.¹

¹It is well settled that the assent of a debtor to the assignment of a debt is unnecessary. See *Conway v. Cutting* (1871) 51 N. H. 407. Notice to the debtor is of course essential to keep him from settling safely with the assignor, *Smith v. Kissel* (1904) 92 N. Y. App. Div. 235; *aff'd*. 181 N. Y. 536; but it is not essential to enable the assignee to sue in his own name in equity where equity has jurisdiction. *Allyn v. Allyn* (1891) 154 Mass. 570; *Murphy v. Marland* (1851) 8 Cush. 575. See *Ensign v. Kellogg* (1826) 4 Pick. 1, and by parity of reasoning it is unnecessary to enable him to sue in his own name at law where the statute gives him that right. *Roger Williams Ins. Co. v. Harrington* (1880) 43 Mich. 252; *Krapp v. Eldridge* (1885) 33 Kan. 106. Assent by the debtor was desirable however, because it enabled the assignee to sue the debtor in the assignee's own name. *Crocker v. Whitney* (1813) 10 Mass. 316; *Mowry v. Todd* (1815) 12 Mass. 281; *Burrows v. Glover* (1871) 106 Mass. 324. See 4 Cent. Dig. p. 1311 § 123. Occasionally it was undesirable because

Bond debts are either negotiable, in which case the same considerations apply to them as to bills and notes,¹ or they are non-negotiable. If a non-negotiable bond calls for the payment of money simply, it is assignable to an enemy of the obligor as much as to anybody else. Like a simple contract debt, however, it must be sued on at common law in the assignor's name even though the bond is payable to the obligee and his assigns.² If a non-negotiable bond calls for the performance of some act, the question whether an enemy can be given the right to call for that act would seem to be the same as the right of one party to an executory contract to give the other party's enemy the right to call for performance. We must therefore consider the case of executory contracts.

It is in the case of executory contracts that we find our exceptions to the rule that choses in action are assignable. Even such an unqualified statute as the Massachusetts one allowing assignees of choses in action to sue in their own names still leaves some contracts unassignable.³ Under such a statute an executory contract would seem to be assignable by a party to it except (1) where the contract expressly provides that it cannot be assigned at all;⁴ (2) where it is expressly made non-assignable to the particular person claiming as assignee;⁵ (3) where its assignment is forbidden by law;⁶ (4) where non-delegable personal services, or non-delegable rights to control the other party's performance, are stipulated for; and (5) where if the assignment were upheld the other party would have to give credit to the

it would make the debtor liable to trustee process (garnishment) by the assignee's creditors. *Folsom v. Haskell* (1853) 11 Cush. (Mass.) 470.

¹ "And the very object of making bonds negotiable is that they may pass from hand to hand like money, and the holder thereof may acquire a perfect title thereto." *Simonton on Municipal Bonds* § 111.

² *Skinner v. Somes* (1817) 14 Mass. 107; *Smock v. Taylor* (1793) 1 Cox (N. J. L.) 177.

³ *LaRue v. Groezinger* (1890) 84 Cal. 281.

⁴ While the parties may expressly stipulate against the contract's assignability, *Mueller v. Northwestern University* (1902) 195 Ill. 236; *Omaha v. Standard Oil Company* (1898) 55 Neb. 337; *Burck v. Taylor* (1893) 152 U. S. 634, and on that account relief even in equity be denied, *Grigg v. Landis* (1868) 19 N. J. Eq. 350; *Zetterlund v. Texas Land etc. Co.* (1898) 55 Neb. 355, only the party for whose benefit the nonassignability is inserted can insist upon the inalienability, *Bennett v. Jersey City* (1879) 31 N. J. Eq. 341; *Fortunato v. Patten* (1895) 147 N. Y. 277; *Wilson v. Reuter* (1870) 29 Ia. 176; *Brigham v. Herrick* (1899) 173 Mass. 460, and he may waive his rights or be estopped to set them up. *Brewster v. City* (1898) 35 N. Y. App. Div. 161; *Bach v. Mining Co.* (1895) 16 Mont. 467; *Staples v. Summerville* (1900) 176 Mass. 237. See *Hudson River etc. Co. v. Electric Light Co.* (1904) 90 N. Y. App. Div. 513.

⁵ *LaRue v. Groezinger* (1890) 84 Cal. 281, 284.

⁶ See U. S. Rev. Stats. § 3477.

assignee or otherwise trust him.¹ Only those of the above exceptions which bear on the Boston Ice Company case interest us here.

Where the obligation of one party to an executory contract is only to pay money for property or services rendered, the money not being payable until the property has been furnished or the work has been done according to contract, and the one who is to be paid could perform by agent or servant or by his executor, the executory contract is clearly assignable by the one who is to be paid.² Of course, if the contract is of such nature that the property furnished must be a particular man's handiwork, or the services must be his alone, so that he could not delegate his performance of the contract to a servant, or his executor would not be entitled to perform for him, it is not assignable by him; but if it is assignable at all it would seem clearly to be assignable to the enemy of the other party whenever such enemy, as the assignor's servant or executor, could fully perform for the assignor. Such, it is submitted, was the case in *Boston Ice Company v. Potter*. If the Citizens' Ice Company had employed the Bos-

¹ For an excellent discussion of the more important of these exceptions see an article by Professor Frederic C. Woodward in 18 *Harvard Law Rev.* 23. It should be noted, however, that Professor Woodward's treatment of the cases which hold contracts to be unassignable where they require credit to be extended by the other party overlooks the difficulty suggested in the following words of a New York judge: "It may be answered that notwithstanding the assignment the Cement Company is still liable, and the Power Company, by gaining through the assignment the liability of the Light Company, has two parties responsible instead of one. But upon this subject we must consider: By the assignment the Light Company assumes and agrees to pay the liability. A recognition of that assignment would leave, at most, the Cement Company liable simply as a surety, which liability might be lessened or destroyed by slight circumstances." Kellogg J. in *Hudson River etc. Co. v. Cement Co.* (1903) 41 *Misc. (N. Y.)* 254, 260.

² *Tolhurst v. Cement Mfrs.* (1903) A. C. 414; *British Waggon Co. v. Lea* (1880) 5 Q. B. D. 149; *LaRue v. Groezinger* (1890) 84 *Cal.* 281; *Parson v. Woodward* (1849) 22 *N. J. L.* (2 Zab.) 196; *Poling v. Boom etc. Co.* (1904) 55 *W. Va.* 529; *Houssels v. Jacobs* (1903) 178 *Mo.* 579; *Liberty Wall Paper Co. v. Stoner* (1901) 59 *N. Y. App. Div.* 353; *aff'd.* 170 *N. Y.* 582; *Devlin v. City of N. Y.* (1875) 63 *N. Y.* 8; *Merritt v. Book-lovers Library* (1903) 89 *N. Y. App. Div.* 454; *Hand v. Brooks* (1897) 21 *N. Y. App. Div.* 489; *Galey v. Mellon* (1896) 172 *Pa. St.* 443; *Phila. v. Lockhardt* (1873) 73 *Pa. St.* 211; *Hedge v. Low* (1877) 47 *Ia.* 137; *Northwestern Coöperage etc. Co. v. Byers* (1903) 133 *Mich.* 534; *Michigan etc. Co. v. Bacon* (1876) 33 *Mich.* 466; *Rice v. Gibbs* (1891) 33 *Neb.* 460; *Alden v. Imp. Co.* (1898) 57 *Neb.* 67; *Brassel v. Troxel* (1896) 68 *Ill. App.* 131; *Am. Bonding Co. v. B. & O. etc. Co.* (1903) 124 *Fed.* 866; *Lakeview Land Co. v. Traction Co.* (1902) 95 *Tex.* 252; *Carter v. State* (1895) 8 *So. Dak.* 153. See *Doll v. Anderson* (1865) 27 *Cal.* 248; *Smith v. Hollett* (1870) 34 *Ind.* 519; *Gaston v. Plum* (1841) 14 *Conn.* 344; *Up River Ice Co. v. Denler* (1897) 114 *Mich.* 296; *Rochester Lantern Co. v. Stiles etc. Co.* (1892) 135 *N. Y.* 209; *Francisco v. Smith* (1894) 143 *N. Y.* 488.

ton Ice Company as its servant to buy, harvest, or manufacture ice and to deliver it to the defendant and to collect from him, and the defendant had refused to deal through the Boston Ice Company, the defendant would have broken his contract. So long as the defendant got the precise thing contracted for, in all respects in the manner contracted for, his mere hatred of the other contracting party's servant would be immaterial. The contract of the Citizens' Ice Company with the defendant would therefore seem to have been well assigned to the Boston Ice Company, even if it be conceded that the latter company was regarded by the defendant as an enemy.¹ Moreover, when the defendant was called on to pay for the ice the contract had apparently been fully performed by the assignee, and no objection having been raised that such performance was not thoroughly satisfactory and nothing remaining to be done except for the defendant to pay, the case on the express contract was substantially as if the Citizens' Ice Company had assigned to the Boston Ice Company a debt due from the defendant. The personal equation, if it ever had been important, had at that time ceased to be so, and the defendant was legally bound to pay.²

It has been suggested that the doctrine of the Boston Ice Company case is "that if an intention not to deal with a particular

¹ Throughout this article the strongest possible case against the plaintiff, namely, that the defendant regarded it as an enemy, is assumed. We do not know how strongly the defendant felt about "the manner of supply" of the ice, nor what the unsatisfactory manner of supply was. Mr. C. H. Cooper, the Clerk of the Supreme Judicial Court of Massachusetts, very kindly examined the records in the case and particularly the bill of exceptions for me and wrote me that "nothing further appears as to the 'manner of supply' of ice than is stated in the report of the case." If, as doubtless was true, the defendant was simply prejudiced against some delivering teamster of the Boston Ice Company, who was replaced by another who served the defendant satisfactorily under the Citizens' Ice Company's contract, the plaintiff's right to recover on the express contract by suing in the name of the Citizens' Ice Company would seem to have been too clear for argument. The following words of Lord Macnaghton are in point: "There are contracts, of course, which are not to be performed vicariously, to use an expression of Knight Bruce, L. J. There may be an element of personal skill or an element of personal confidence, to which, for the purposes of the contract, a stranger cannot make any pretensions. But no one, I suppose, would seriously argue that a contract for the delivery of chalk from particular quarries for the use of particular cement works cannot be performed by any person for the time being possessed of the quarries, or that it can make the slightest difference to anybody who the proprietors of the Cement Works or the actual manufacturers may be, provided they are in a position to carry out the terms of the original contract." *Tolhurst v. Cement Mfrs.* (1903) A. C. 414, 417. See *Michigan, etc. Co. v. Bacon* (1876) 33 Mich. 466, where the court said it was the doing of the act contracted for, and not the person of the doer, that was considered "the essence of the agreement."

² *Taylor v. Black Diamond Coal Mining Co.* (1890) 86 Cal. 589.

person appears from circumstances outside of the contract it cannot be assigned to such person,"¹ just as it could not be assigned to him if expressly made non-assignable to him; but the difficulty with that suggestion is that it is indefensible under the facts of *Boston Ice Company v. Potter*. You may be anxious to tie the hands of the Boston Ice Company so that it cannot receive an assignment, but you can do that only by saying that the Citizens' Ice Company has lost its right to make an assignment to the Boston Ice Company. And how has the Citizens' Ice Company lost that right? You can take the right of assignment from the Citizens' Ice Company only by reading into its contract with the defendant a dispute between the defendant and the Boston Ice Company of which, so far as we are informed, the Citizens' Ice Company never heard. How is it possible to justify that? To read a clause into a contract in order to feed the spite of one party against a third person to whom it afterwards becomes desirable for the other and uninformed party to assign is not only to violate every notion of that mutual assent which is as necessary for contracts implied in fact as for express contracts, but is also, since a contract right is, in a broad sense of the word, property,² to go counter to that important principle of public policy which favors the alienability of property.

In whatever way the case be viewed, the Boston Ice Company would seem to have been entitled to all the rights of assignee of the contract of the defendant, of the Citizens' Ice Company. The plaintiff was not in court as assignee, of course, but the question of whether or not it was a legal assignee bears directly upon its rights in quasi-contract. Our discussion of the assignability of the express contract is needed for the solution of the quasi-contract question.

II. *Was the Boston Ice Company Entitled to Recover on Quasi-Contract Principles?*

The quasi-contract question is not as simple as the assignment of contract question. To ask the law to raise a new quasi-contractual obligation against the protest of the defendant is not the same thing as to ask it to recognize an assignment of an already existing legal obligation created by the assent of the parties. Before the obligation can be raised, the plaintiff must

¹ *LaRue v. Groezinger* (1890) 84 Cal. 281, 284.

² See *Aurora Bank v. Black* (1891) 129 Ind. 595.

show cause; the burden of making out an injustice which a court of law should redress on quasi-contractual principles rests upon the plaintiff.

The first thing to notice is that the court felt that the plaintiff corporation was in the wrong because it concealed from the defendant that it was furnishing the ice. Now it is the doctrine of a number of states, and Massachusetts is one, that if a plaintiff's conduct has been very reprehensible he shall not be allowed to recover in quasi-contract, even though the defendant has been enriched at his expense. Such a case, say these courts, is found where the plaintiff after a part performance of an entire contract unwarrantably refuses to perform further; and the Massachusetts decisions are numerous and clear that the plaintiff cannot recover in such case.¹ The test in Massachusetts is clearly between the bad faith of plaintiff and his good faith, for in the same state a plaintiff who has an honest intention to go by the contract and fails to do so is allowed to recover in quasi-contract the value of his work not exceeding the contract price.² If, therefore, the plaintiff is such a bad man as deliberately to break his binding contract, a Massachusetts court of law will refuse him recovery in quasi-contract although the defendant is greatly enriched at his expense, provided the defendant is not to blame for the failure to complete the contract. That doctrine has the appearance of having something more in its favor than the badness of the plaintiff, for it seeks to rely on a proposition which will interest us later, namely, the assertion that "an express contract always excludes an implied one in relation to the same matter."³ The irony of this reasoning lies in the fact that always before telling the plaintiff that he cannot recover in quasi-contract be-

¹ *Faxon v. Mansfield* (1806) 2 Mass. 147; *Stark v. Parker* (1824) 2 Pick 267; *Thayer v. Wadsworth* (1837) 19 Pick 349; *Olmstead v. Beale* (1837) 19 Pick 528; *Davis v. Maxwell* (1847) 12 Metc. 286; *Moore v. Mansfield* (1902) 1182 Mass. 02; *Keefe v. Fairfield* (1903) 184 Mass. 334. For other jurisdictions see 15 Am. Eng. Ency. Law, 2d ed. p. 1087, and Supplement. In *Moore v. Mansfield* (*supra*) Mr. Chief Justice Holmes said: "there being no waiver the plaintiff could not recover on the express contract because he had not furnished the stipulated consideration, and he could not recover upon an implied one, for the benefit actually received because the failure to furnish the whole was due to his own wilful default. It may be that in this class of cases the old common law is adhered to a little more rigidly than in some others."

² *Hayward v. Leonard* (1828) 7 Pick 181; *Powell v. Howard* (1872) 109 Mass. 192; *Blood v. Wilson* (1886) 141 Mass. 25; *Atkins v. Barnstable* (1867) 97 Mass. 428; *Bassett v. Sanborn* (1851) 9 Cush. 58. See *Giles v. Cobe* (1901) 177 Mass. 584.

³ *Olmstead v. Beale* (1837) 19 Pick 528. By "implied" contract the court here means quasi-contract.

cause he has an express contract, the Court proceeds to inform him that he has no cause of action on the express contract. The essential unfairness of that situation has led other courts to adopt a different rule. Because the plaintiff has no remedy on the express contract, and because it is not fair for the defendant to keep more than enough of plaintiff's services or money to recompense him for plaintiff's breach of the contract, a number of the courts allow plaintiff to recover on quasi-contract principles.¹ Massachusetts, however, does not allow recovery, and *Boston Ice Company v. Potter* must be judged from the Massachusetts standpoint. It is important to notice, however, that a Court which follows *Britton v. Turner*² would naturally be unconcerned over plaintiff's alleged badness.

But, even in Massachusetts, are there not relative degrees of badness? Even if one who deliberately breaks his contract is so bad that no recovery should be allowed him in quasi-contract, is a man who has the right to force you to deal with him as assignee of an express contract and who, instead of forcing you to deal with him, conceals the fact that he has replaced the original contractor, such a bad man that you must deny him recompense for his goods? Instead of being a bad man it would appear that he is excessively considerate of your feelings and merits commendation rather than disapproval. The Boston Ice Company, therefore, so far as the case shows was either only mildly bad or genuinely praiseworthy, and so should not have been denied recovery.³ And even if one could take the view

¹ *Britton v. Turner* (1834) 6 N. H. 481; *Murphy v. Sampson* (Neb. 1902) 96 N. W. 494; *McKnight v. Bertram Heating Co.* (Kan. 1902) 70 Pac. 345. For other cases see 15 Am. Eng. Ency. Law, 2d ed. p. 1089 and Supplement.

² *Supra*.

³ Is it not because the plaintiff is not really very bad that he is allowed to recover where the defendant has not consumed the goods but still has them on hand? *Mudge v. Oliver* (1861) 1 Allen (Mass.) 74; *Barnes v. Shoemaker* (1887) 112 Ind. 512. See *Belfield v. National Supply Co.* (1899) 189 Pa. St. 189; See also *Orcutt v. Nelson* (1854) 1 Gray (Mass.) 536; *Wellauer v. Fellows* (1879) 48 Wis. 105 and *Randolph Iron Co. v. Elliott* (1870) 34 N. J. L. 184, where, however, as was in part true in *Belfield v. National Supply Co.* (*supra*), the defendant knew that plaintiff was the seller before he actually received the goods. To be sure the Massachusetts Court said in *Mudge v. Oliver* (*supra*) that the defendant, by retaining the goods after knowledge, "recognized the plaintiff as his vendor," and the Indiana Court said in *Barnes v. Shoemaker* (*supra*) that the defendant was liable by "ratification;" but where the plaintiff is regarded as very bad, as he is in the Massachusetts cases contra to *Britton v. Turner*, the retention of benefit by the defendant with knowledge is regarded in Massachusetts as immaterial. See *Keefe v. Fairfield* (1903) 184 Mass. 334.

that plaintiff had no standing as assignee of the express contract, is a man who as supposed assignee has tried to carry out an express contract with you, and has done it so well that you have no objection to offer except your dislike of him, such a bad man that recovery for goods furnished under the contract should be denied him? Is it not really you who are bad for refusing to pay? Undoubtedly the inexcusable officiousness of plaintiff is always a defense in our law to a claim of quasi-contract liability, but is it true that one who in good faith believes himself to be assignee of an express contract and entitled to perform thereunder, and who out of consideration for the other party's feelings conceals his claim to be assignee, is to be rated as so officious that he has no equity against the one who has received and consumed satisfactory goods furnished in fulfilment of the contract? It cannot be true,¹ yet if in the Boston Ice Company case the contract could not be assigned to the plaintiff that decision says that it is true. Remember that in the Boston Ice Company case the plaintiff for all that appears acted in the best of faith. Bad faith on plaintiff's part not appearing, and the defendant having received full satisfaction under the contract, the plaintiff was presumptively in good faith and was not reasonably to be regarded as an officious volunteer. Instead of being conclusively bad the plaintiff was *prima facie* good.

The second thing to notice is that the defendant never had a chance to protest against liability to plaintiff. It is a Massachusetts doctrine that one may evade quasi-contractual liability in some instances by constantly denying any liability.

Said the Massachusetts Court in *Earle v. Coburn*:²

"There may be cases where the law will imply a promise to pay by a party who protests he will not pay; but those are cases in which the law creates a duty to perform that for which it implies a promise to pay, notwithstanding the party owing the duty absolutely refuses to enter into an obligation to perform it. The law promises in his stead and in his behalf. If a man absolutely refuses to furnish food and clothing to his wife or minor children, there may be circumstances under which the law will compel him to perform his obligations, and will of its own force

¹ *Turner v. Webster* (1880) 24 Kan. 38, fully establishes the right of a plaintiff to recover in quasi-contract where he acts under a mistake as to the existence of a contract with him. It should be noted that in the Boston Ice Co. case, as in *Turner v. Webster*, if there was a mistake as to the contract it was a mistake of fact, not of law; for whether the plaintiff corporation's past or its personality precluded the assignment to it of the contract to furnish ice was clearly a question of fact.

² (1881) 130 Mass. 596, 598.

imply a promise against his protestation. But such promise will never be implied against his protest except in cases where the law itself imposes a duty; and this duty must be a legal duty."

Now in saying this the Court seems clearly to have confused a quasi-contractual obligation with a contract implied in fact. Mutual assent is of course needed for the latter; but for quasi-contractual liability all that is needed is unjust enrichment of the defendant at the expense of the plaintiff, enrichment not being regarded as unjust if the plaintiff was inexcusably officious. It is quite true, as the Court in *Earle v. Coburn* cites the Boston Ice Company case to show, that "a promise will not necessarily be implied from the mere fact of having derived a benefit," though in that statement the word "obligation" should be used instead of "promise;" but an obligation will be implied where there is benefit to the defendant for which plaintiff at the time intended to charge, if the plaintiff was not officious but acted reasonably. It would seem that the plaintiff in *Earle v. Coburn*¹ acted fully as reasonably as the plaintiff in *Great Northern Railroad Co. v. Swaffield*,² and that the necessity of plaintiff's action in the Massachusetts case was fully as great as that of the railroad company in the English case *after* the first night, but the Massachusetts law is settled upon the point.³ It should never be forgotten, however, that in *Boston Ice Company v. Potter* the defendant did not in fact protest against plaintiff's performance until it was all over. The fact that defendant would have protested if he had known is immaterial in Massachusetts, if only the plaintiff was not officious in acting. The fact that the defendant had no chance to protest is no stronger than the fact that he had no chance to consent to deal with plaintiff, and, if he had consented, a return of animosity before action brought would have been immaterial.⁴ The case of the man who found a five dollar boat and reasonably spent twenty-six dollars to repair it, and was allowed to recover the twenty-six dollars against the protesting owner who knew nothing about the repairs until they were all over, but claimed the boat, shows that defendant's position in *Boston Ice Company v. Potter* was not the same as it would have

¹ *Supra*.

² (1874) L. R. 9 Exch. 132.

³ *Whiting v. Sullivan* (1810) 7 Mass. 107; *Earle v. Coburn* (1881) 130 Mass. 596; *Putnam v. Glidden* (1893) 159 Mass. 47; *Keith v. De Bussigny* (1901) 179 Mass. 255. The last case is *semble contra* to *Great Northern R. R. Co. v. Swaffield* (*supra*).

⁴ See *Graff v. Callahan* (1893) 158 Pa. St. 380.

been had he known all the time and had protested.¹ So it all comes back to the assignment, because, if the plaintiff had legal rights as assignee, he was not only not officious but the defendant owed him the kind of legal duty which the Court in *Earle v. Coburn* conceded could be the basis of a quasi-contract obligation against a protesting defendant.² A man may have a right to his prejudices when he is making his will or is choosing the other party to an express contract, but a defendant has no right to make a profit out of his prejudices at the expense of another who is not making him a present and who is not so blameworthy that he should be punished for the defendant's financial benefit. If, therefore, the Boston Ice Company case is to be supported, some other ground must be sought than the defendant's protest or lack of a chance to protest.³

Before taking up the ground upon which the Boston Ice Company case can be supported as a quasi-contract decision, a word is necessary about the English cases cited in it. Those cases are *Schmaling v. Thomlinson*⁴ and *Boulton v. Jones*.⁵ In the former case the defendant had contracted with a firm for certain services and, unknown to the defendant, the plaintiff had been employed by that firm to perform the services. As plain-

¹ *Chase v. Corcoran* (1871) 106 Mass. 286. The case of *Cahill v. Hall* (1894) 161 Mass. 512 was not *contra*; for the fact that the plaintiff had a contract with a third person under which he could recover for the very services sued for in that case was held enough to prevent the implication of a quasi-contractual obligation in his favor against the defendant.

² See *Central Bridge Corporation v. Abbott* (1849) 4 Cush. 473, where a defendant was made to pay toll over a bridge although he had always claimed exemption from liability to pay toll and had always refused to pay it.

³ Professor Keener says that "to have allowed a recovery by the plaintiff in the [case of] *Boston Ice Co. v. Potter* would have been, to use the language of Lord Mansfield in *Stokes v. Lewis* [1 T. R. 20], to have allowed a recovery against the defendant 'in spite of his teeth' and would have been entirely destructive of the doctrine that a man has a right to select his creditor." Keener on Quasi-Contracts, pages 360, 361. The latter doctrine, if it really existed in unqualified form, would be entirely destructive of the law of quasi-contracts; for a plaintiff is never selected by the defendant as his quasi-contract creditor. The whole truth of the idea that a man has the right to select his creditor is comprised in the general propositions that actual contracts must rest in their formation on mutual assent and that quasi-contract obligations will not be raised in favor of officious intermeddlers. The phrase "in spite of his teeth," though helpful where the question is one of implying a contract in fact, really obscures the quasi-contract question, which is whether plaintiff has been inexcusably officious where but for officiousness on his part we should say that the defendant had been unjustly enriched at the plaintiff's expense. This quasi-contract question we have discussed in the text.

⁴ (1815) 6 Taunt. 147.

⁵ (1857) 2 H. & N. 564.

tiff had a cause of action against the firm which employed him, the court refused him a recovery against the defendant. That case has a following in *Cahill v. Hall*,¹ but is unlike the Boston Ice Company case because in the latter the plaintiff did not have any remedy against a third person and did not look at any time to any third person for payment. In *Boulton v. Jones*, on the other hand, recovery was denied because the defendant had ordered the goods from his debtor, and, if the plaintiff who had furnished the goods without defendant's knowledge had been allowed to recover, the defendant would have lost the set-off he expected and was entitled to. If, as the decision requires us to assume, the set-off equalled or exceeded the value of the goods supplied by plaintiff, the defendant had a complete defense and the plaintiff's sole remedy, if any, was to ask subrogation to the defendant's claim against the latter's debtor to the amount of the value of plaintiff's goods. If the set-off was less than the value of plaintiff's goods, the plaintiff should have had judgment for the excess of the value of plaintiff's goods over the set-off.² Indeed the case of *Mudge v. Oliver*,³ where the defendant was held liable despite a set-off against the one he supposed was selling to him, seems still to be law in Massachusetts. In any event the case of *Boulton v. Jones* gives no support to the case of *Boston Ice Company v. Potter*; for in the latter case there was no set-off.

But though the Boston Ice Company case is like no previous case and is rested by the court on untenable grounds, the actual decision may be supported on a familiar principle, if it be conceded, as it must be that the Boston Ice Company was the duly constituted assignee of the Citizens' Ice Company's contract with the defendant. That principle is that where there is an express contract on which the plaintiff can recover he should be compelled to sue upon that. It is a principle in force in Massachusetts,⁴ and is absolutely defensible in cases like that of the Boston Ice Company where recovery could be had against nobody but the defendant and more could not be recovered in quasi-contract than could be recovered on the express contract.

¹ (1894) 161 Mass. 512.

² Keener on Quasi-Contracts p. 359, 360. See *Frame v. Cole Co.* (1881) 97 Pa. St. 309; *Belfield v. National Supply Co.* (1899) 189 Pa. St. 189.

³ (1861) 1 Allen (Mass.) 74.

⁴ *Olmstead v. Beale* (1837) 19 Pick. 528; *Cahill v. Hall* (1894) 161 Mass. 512; see *Whiting v. Sullivan* (1810) 7 Mass. 107. Cf. *Cooper v. Cooper* (1888) 147 Mass. 370.

The Boston Ice Company case was not within that exception which allows recovery in quasi-contract where the defendant is willfully or inexcusably in default under a contract, because that exception exists only where the defendant's default amounts to an abandonment of the contract.¹ In the Boston Ice Company case the defendant had not abandoned the contract, but, instead, had fully lived up to it except in the matter of payment. Then too, the plaintiff in the Boston Ice Company case did not come within the reason of the exception, which is that unless a plaintiff is allowed a quasi-contract recovery the defendant may make a profit out of breaking the contract because legal damages for breach of contract would be less than the consideration which the defendant received from the plaintiff.² No such reason existed in the Boston Ice Company case; if a quasi-contractual obligation were implied there the plaintiff could recover no more than the contract price. Nor was the Boston Ice Company case within the further exception that where the contract has been fulfilled except for the payment of money, the latter may be recovered on the common counts.³ For even though the action may be treated under the Massachusetts statutes as one on the common counts if need be,⁴ the exception can never apply where one person would have to be plaintiff if the action is brought on the express contract and a different one would have to be plaintiff if the action is brought on the common counts; for the same reason those cases which allow one surety to sue his co-surety in *indebitatus assumpsit* for contribution, although there is an express agreement for contribution, are not helpful.⁵ Moreover, the assignee of an express contract, no express assignment of the quasi-contract right being made, does not seem ever to have been allowed the quasi-contract remedy prior to the statutes allowing

¹ Keener on Quasi-Contracts, p. 303.

² Id. p. 299.

³ *Felton v. Dickinson* (1813) 10 Mass. 287; *Evans v. Howell* (1904) 211 Ill. 85.

⁴ Pub. Stats. of Mass. (1882) 964 § 1; 2 Rev. Laws Mass. (1902) 1549 § 1.

⁵ See *Weeks v. Parsons* (1900) 176 Mass. 570, where, as the court admits, the question as to a surety's right to sue in quasi-contract even though there was an express contract was "a purely academic one." The court there cited only *Gibbs v. Bryant* (1822) 1 Pick. 118, which put the holding on the ground that the written agreement of contribution contained nothing more than the law would imply. That reasoning would fail in the Boston Ice Company case, for, in the absence of the express agreement which plaintiff was acting under, plaintiff would be an officious intermeddler and therefore no obligation would be implied in his favor.

him to sue on the express contract in his own name. There was indeed excellent reason why he should not be allowed any quasi-contract remedy. It is familiar doctrine that a quasi-contract action is the equivalent of a bill in equity, yet

"A court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy."¹

This statement of equity's attitude is clearly the one which should govern in quasi-contracts. The plaintiff in the Boston Ice Company case could not bring an action in its own name on the express contract, but it could bring one in its assignor's name and in that recover all that could be awarded if a quasi-contract obligation should be recognized. Plaintiff's remedy on the express contract being adequate, the court properly refused to recognize a quasi-contract obligation.²

Conclusion.

The upshot of our whole discussion may be stated in two propositions:

1. If the court's notion that the express contract was not assignable could by any possibility be correct, the decision in *Boston Ice Company v. Potter* would be erroneous because the plaintiff, reasonably believing itself entitled to act as assignee, was not an officious intermeddler, and, having no remedy on the express contract, was entitled to recover in quasi-contract.³

¹ Walker v. Brooks (1878) 125 Mass. 241. See Hayward v. Andrews (1882) 106 U. S. 672.

² The Boston Ice Company case is to be discriminated from the later case of Pittsburg Plate Glass Co. v. MacDonald (1903) 182 Mass. 593, because in the latter case the defendant was not enriched at plaintiff's expense, and, indeed, not at all. The defendant had a contract to put in glass for three elevations of a third person's building and employed the plaintiff to put in the glass. The plaintiff put in one elevation too much, but the owner of the building and not the defendant profited thereby; and as the defendant had cautioned the plaintiff not to put in too much glass there was no possible ground on which to hold the defendant liable.

³ Dr. Roscoe Pound, Dean of the College of Law of the University of Nebraska, has kindly furnished to the writer the following statement of the Roman Law bearing upon this question:

In the Roman law it is held that an error in *persona* though it may be material to the transaction so far as to prevent an obligation *ex contractu* from arising, is not material to the question of quasi-contract,

2. If, however, the court was wrong in thinking the contract not assignable to plaintiff, and that it *was* wrong we have already seen, the decision in the Boston Ice Company case was perfectly sound because the plaintiff, having already an adequate remedy on the express contract in its assignor's name, had no excuse for asking that a quasi-contractual obligation be imposed upon the defendant.¹

It is submitted that in *Boston Ice Company v. Potter* the contract was assignable to plaintiff; that it actually was assigned to plaintiff; that plaintiff had an adequate remedy on the express contract in its assignor's name; that plaintiff's remedy on the express contract precluded any quasi-contractual obligation; and that because at that time in Massachusetts the assignee of a contract could not sue in his own name on the express contract the case was rightly decided.

GEORGE P. COSTIGAN, JR.

LINCOLN, NEB.

since it is indifferent from what source the unjust enrichment proceeds. Dernburg, Pandekten, I. § 102, note 6; Baron, Pandekten, § 50, II., 4. Hence if A borrows money of B believing that C is to be his creditor, and intending to deal with him only, there is no contract of loan because the *consensus* is wanting. Nevertheless there is a quasi-contractual obligation and B may recover the money by the so-called *condictio Inuentiana*. Digest, 12, 1, 32. Savigny has pointed out that the action in such case is not at all a special one provided for such a situation, but is merely the ordinary *condictio ob causam datorum* (brought where something is given or done or paid in expectation of a counter-performance or of creating some relation or on some other *causa futura* which fails) because B advanced the money expecting to become a lender and his expectation, upon which he paid it over, that a contractual relation would ensue is frustrated by A's error as to the person. Savigny, System, III., 271. There are cases, however, such as sales for cash, where the *error in persona* is not material to the question of contract, so that the transaction will be valid *ex contractu* notwithstanding the error. Dernburg, Pandekten, I., § 102, 4, b.

¹ But if this second proposition is correct the case of *Boston Ice Company v. Potter* has no application in Massachusetts to-day, except where the assignment of contract is not in writing. Where the assignment is in writing the assignee can sue under the Massachusetts statute in his own name on the contract and therefore the doctrine that, where a contract has been performed except for the payment of money, the latter may be recovered under the common counts would apply. *Felton v. Dickinson* (1813) 10 Mass. 287; *Evans v. Howell* (1904) 211 Ill. 85. For the same reason the Boston Ice Company case has no application to-day in any state where the assignee of a contract either may or must sue in his own name.